IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-295

FIRST NATIONAL CITY BANK,
Petitioner,

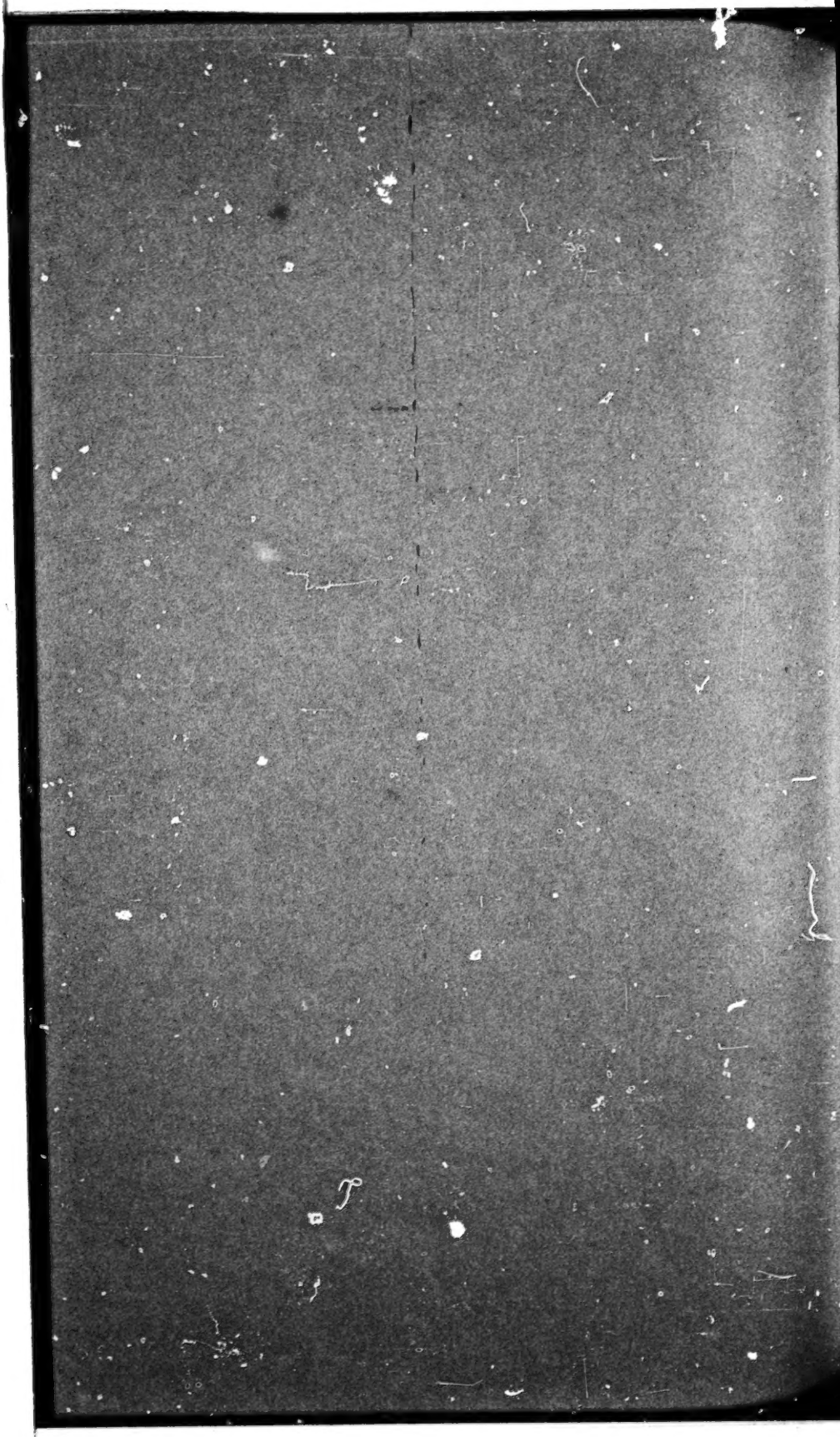
against

BANCO NACIONAL DE CUBA,
Respondent.

BRIEF FOR PETITIONER ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

HENRY HARFIELD,
Attorney for Petitioner
53 Wall Street
New York, N. Y. 10005

SHEARMAN & STERLING
HERMAN E. COMPTER
JAMES B. KEENAN
Of Counsel



INDEX

TABLE OF AUTHORITIES

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First National City Bank (formerly known and sued herein as The First National City Bank of New York) was granted certiorari, on October 12, 1971, to review the judgment of the United States Court of Appeals for the Second Circuit on remand, reinstating its earlier judgment, which reversed a final order and judgment of the United States District Court for the Southern District of New York granting summary judgment for petitioner and dismissing the action on the merits. This Court vacated that earlier judgment of the court of appeals and directed reconsideration in light of the views of the Department of State expressed in its letter dated November 17, 1970.

Opinions Below

The majority and dissenting opinions in the court of appeals are reported at 442 F.2d 530. The first order of this

Court is reported at 400 U.S. 1019. The earlier opinion of the court of appeals is reported at 431 F.2d 394, and the opinion of the district court is reported at 270 F. Supp. 1004.

Jurisdiction

The judgment of the court of appeals was entered April 27, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Shall a court in the United States decline on the ground of the federal act of state doctrine to permit a United States national, as defendant, to offset against the claim of a foreign government plaintiff its claim for compensation for property confiscated by that foreign government, notwithstanding the decision of this Court in *National City Bank* v. *Republic of China,* 348 U. S. 356 (1955), the provisions of Section 2370(e) of the Foreign Assistance Act of 1961, as amended, and the declaration of the Executive Branch, based upon its determination of the foreign policy interests of the United States, that the act of state doctrine should not be applied in this or similar cases?

2. Was the district court correct in its determination that the Cuban government's seizure of the property of a United States national, pursuant to Cuban Law No. 851, was in violation of international law, that the United States national was entitled to compensation for the property confiscated by Cuba, and that the United States national is lawfully entitled to offset that claim for compensation against the claims by the Cuban government or its instrumentality in an action instituted by such Cuban government instrumentality in the courts of the United States?

Statutes Involved

The Foreign Assistance Act of 1964, as amended, 22 U.S.C. § 2370(e)(1), (2) (Hickenlooper Amendment), Law

No. 851 of Cuba, and Fundamental Law of Cuba, Article 24, are set forth following this brief.

Statement

Petitioner, a national banking association, has a claim against the government of Cuba, based on the taking of petitioner's property in September 1960. The validity of this claim was determined by the Foreign Claims Settlement Commission (the "Commission") pursuant to Title V of the International Claims Settlement Act of 1949, as amended, and the Commission determined the amount of the claim to be $4,863,731.04 plus interest after deduction of petitioner's recoveries against Cuba, including the offset hereafter described. *In the Matter of the Claim of First National City Bank,* F.C.S.C. Dec. No. CU-3835, November 14, 1969.

Respondent is an instrumentality of the government of Cuba acting in this case for and on behalf of Cuba*; for purposes of this litigation the plaintiff-respondent is the government of Cuba. It commenced this action in the District Court for the Southern District of New York to recover $2,347,000, alleging federal jurisdiction under 28 U.S.C. § 1332. The claims arose out of petitioner's withholding from respondent the surplus proceeds of Cuban collateral originally pledged as security on a loan made by petitioner to Cuban government instrumentalities.

Petitioner asserted an offset in the amount of the value of its seized Cuban property. The district court, Judge Bryan, held this offset proper; and, upon the stipulation of the parties that the offset exceeded the amount of respondent's claim, entered judgment for petitioner.

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* The district court found that "There is no serious question that the Government of Cuba and Banco Nacional are one and the same for purposes of this litigation". (Appendix ("A."), p. 37) Respondent "at various times has argued that defendant's (petitioner's) claim against the Cuban government cannot be asserted against Banco Nacional, an entirely separate entity". (A. p. 37, n. 3) This argument was renewed on appeal, but the court below did not pass on it.

Respondent appealed and the court of appeals, holding that allowance of the offset was error, reversed.

On petition to this Court for a writ of certiorari, the Solicitor General filed a memorandum transmitting a letter expressing the Department of State's view that the act of state doctrine should not be applied to bar consideration of the counterclaim in this or like cases. (A. p. 82) This Court granted the writ, vacated the judgment of the court of appeals and remanded the case for reconsideration in light of the views expressed by the Department of State. On remand, the majority of the same panel of the court below (Judge Hays dissenting) reinstated its earlier judgment notwithstanding the Department's views. The majority opinion by Chief Judge Lumbard (in which District Judge Blumenfeld, sitting by designation, concurred) appears at A. p. 73; the dissenting opinion by Circuit Judge Hays at A. p. 86.

There is no dispute as to the facts. From August, 1915 until September, 1960, petitioner maintained branch offices in Cuba, pursuant to Section 25 of the Federal Reserve Act and Cuban law (A. pp. 19, 20). On September 16, 1960, petitioner operated eleven branches in Cuba (A. pp. 19, 29).

In 1958, Cuba applied to petitioner for a loan for government purposes. Petitioner made the loan, in the initial principal amount of $15,000,000, secured by obligations of the United States Government and the International Bank for Reconstruction and Development (the "collateral"). The loan was made, and the collateral received in pledge, at petitioner's head office in New York City on July 8, 1958.

At the request of Cuba, the original one year maturity was extended for another year. In July 1960, Cuba proposed to pay $5,000,000 on account of principal, against release to it of a proportionate amount of the collateral (which was done), and to defer payment of the balance

for a further period of one year from July 8, 1960. Petitioner agreed to this proposal upon the express proviso that the continuance of the loan was predicated upon a continuance of conditions then existing in Cuba. Documentation covering the extension was sent to Cuba for execution, but was never returned. (Record ("R"): Notice of Motion of Defendant for Summary Judgment ("Def. Mot."), Supporting Affidavit of C. Boise Nourse, p. 5.)

More or less simultaneously, Cuba enacted Law of Nationalization No. 851 (*infra*, p. 2a) and thereafter on September 16, 1960, the Cuban government seized petitioner's branches in Cuba and turned them over to respondent, which is still in possession and control of those properties. The Fundamental Law of Cuba (*infra*, p. 6a) and Cuban Law No. 851 (*infra*, p. 3a) provide that compensation shall be paid for property taken by the Cuban government, but no compensation has been paid to petitioner.

Petitioner promptly exercised its rights to sell the collateral for the $10,000,000 loan, which yielded proceeds of $11,892,448.41, according to petitioner's records (R: *id.*, p. 7), which was applied to principal and interest then due, leaving a surplus of $1,810,081.51. Although the amount of petitioner's offset was in dispute, the parties have stipulated, for the purpose of this action, that the amount of the petitioner's counterclaim exceeds the amount of the surplus collateral. (The Commission later determined the value of the seized branches to be $9,510,000.00.)

Petitioner's claim is asserted as a defensive counterclaim only; that is, as an offset against the claim for surplus collateral. Petitioner seeks no affirmative judgment against Cuba in this action.

Summary of Argument

The court below erred in treating the act of state doctrine as a bar to adjudication of the validity of petitioner's

offset and defensive counterclaim. The act of state doctrine is not applicable to a defense that offsets a claim for money due from a sovereign against a money claim by a sovereign. The act of state doctrine is not available to a sovereign, as a defense to a counterclaim in the courts of the United States, when the Legislative and Executive branches of our government have explicitly declared that the doctrine should not be applied.

As the decision of the district court, on the merits, was permissible and correct, the judgment of that court should be reinstated and affirmed.

Argument

I

The Act of State Doctrine is No Bar to the Counterclaim.

In this action, petitioner has pleaded separate defenses and set-offs, asserted as counterclaims, that set forth independent, but consistent theories. One of these calls in question the validity of Cuban Law 851 in its application to petitioner. The other does not. The former asserts that Cuba's seizure of petitioner's property was unlawful. The latter asserts that the consequence of Cuba's seizure of petitioner's property, putting aside the question as to validity of that seizure, was an obligation to pay fair compensation for the property taken and retained. Absent an applicable exception[1], the act of state doctrine bars con-

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[1] E.g., *Banco Nacional de Cuba* v. *Farr*, 383 F.2d 166 (2d Cir. 1967) *cert. den.* 390 U.S. 956; *Bernstein* v. *N.V. Nederlandsche-Amerikaansche, etc.*, 210 F.2d 375 (2d Cir. 1954); Stevenson Letter, 10 Int'l Legal Mat. 89 (1971) (A. p. 82); Hickenlooper Amendment, 22 U.S.C. § 2370(e)(2) (*infra*, p. 2a); *Anglo-Iranian Oil Co.* v. *Jaffrate*, [1953] 1 W.L.R. 246 (*The Rose Mary*). As hereafter shown, *infra* pp. 11-15, these exceptions are applicable to this case.

sideration of petitioner's claim that Cuban Law 851 was invalid and the seizures thereunder wrongful. The act of state doctrine does not bar consideration of the legitimacy of petitioner's claim that the Cuban government is indebted to it in an amount such that the Cuban government should take nothing in this action.

The district court adjudicated the merits of petitioner's counterclaim against the Cuban government and held that the petitioner was entitled to judgment, dismissing respondent's claim against it. (A. p. 47) In its review of the district court's judgment, the court of appeals did not reach the merits of the controversy and made no substantive determination. It held that the act of state doctrine was a bar to consideration of the counterclaim, and it therefore reversed the judgment of the district court and directed the entry of judgment for the respondent in the amount of its claim free of any defenses, offsets or counterclaims. The parties have stipulated that the amount of the counterclaim exceeds the amount of the claim. (A. p. 4)

Petitioner applied to this Court for a writ of certiorari. Upon that application the Solicitor General of the United States transmitted to this Court a statement setting forth the views of the Deparment of State which were, in substance, that the court of appeals need not and should not have applied the act of state doctrine as a bar to adjudication of petitioner's counterclaims. This Court granted the petition and remanded the case to the court of appeals for reconsideration in the light of the views expressed by the Department of State. (A. p. 71)

Upon such reconsideration a majority of the panel below adhered to the original determination. Judge Hays dissented on the ground that the majority ignored "both the exception to the act of state doctrine in *Bernstein*, and the fundamental purpose of the doctrine itself". (A. p. 86)

The decision of the majority in the court below was erroneous for the following reasons:

(1) In a case instituted in the United States courts by a foreign government, the act of state doctrine has no application to a defensive counterclaim that does not call in question title to property transferred in the territory of a foreign sovereign nor depend solely upon the invalidity of an act done or permitted by such a sovereign within such territory;

(2) Congress has declared that a foreign government may not use the act of state doctrine as a defense, even against a challenge to the validity of that government's acts, in a case where the claim against that government arises out of a confiscation or taking (after January 1, 1959) in violation of the principles of international law; and

(3) The Executive Branch has found that application of the act of state doctrine is not required by the foreign policy interests of the United States and has formally represented to this Court that the doctrine should not be applied to bar consideration of a counterclaim or set-off against the government of Cuba in this or like cases.

1. *The Act of State Doctrine is not Applicable to Cases of this Nature.* This court decided in *National City Bank* v. *Republic of China,* 348 U.S. 356 (1955), that considerations of fairness and equity require allowance of a counterclaim in reduction or extinguishment of the claim of a foreign sovereign suing in our courts. Petitioner's Third Complete Defense, Setoff, and Counterclaim alleges that Cuba is indebted to it in an amount substantially in excess of the amount claimed in this action (A. pp. 23-24). This is precisely the kind of counterclaim which petitioner asserted and this Court allowed in *Republic of China.*

The act of state doctrine has no application to such a counterclaim. The act of state doctrine, as stated by Mr. Justice Harlan in *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964), creates a presumption that foreign acts of state are valid and therefore precludes consideration of a claim or argument that depends upon a showing of invalidity of such act.

A careful reading of the federal cases applying the act of state doctrine shows that, in the main, the issue was title to specific property.[2] In those cases the courts recognized title derived through the foreign act of state where the act occurred while the property was in the foreign jurisdiction, and held that the act of state doctrine precluded attack upon the validity of the foreign act upon which title depended. No cases have been found precluding a party, under the act of state doctrine, from enforcing the defaulted obligation of a foreign sovereign.[3] Sovereign immunity from suit, if claimed by the sovereign, may, of course, prevent enforcement of the sovereign's obligation in our courts. That bar is not present in this case, since Cuba, by bringing the action, has waived its immunity to the extent of its claim and has subjected itself to the jurisdiction of the court upon a defensive counterclaim.

Republic of China is directly in point. There, in an action by a foreign sovereign, counterclaims were permit-

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[2] *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964); *United States* v. *Pink*, 315 U.S. 203 (1942); *United States* v. *Belmont*, 301 U.S. 324 (1936); *Shapleigh* v. *Mier*, 299 U.S. 468 (1937); *Ricaud* v. *American Metal Co.*, 246 U.S. 304 (1918); *Oetjen* v. *Central Leather Co.*, 246 U.S. 297 (1918); *The Santissima Trinidad*, 7 Wheat. 283 (1822); *L'Invincible*, 1 Wheat. 238 (1816); *The Schooner Exchange* v. *McFaddon*, 7 Cranch 116 (1812); *Hudson* v. *Guestier*, 4 Cranch 293 (1808); *Ware* v. *Hylton*, 3 Dall. 199 (1796); *see* 376 U.S., at 416, 417.

[3] *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347 (1909) and *Underhill* v. *Hernandez*, 168 U.S. 250 (1897) did not involve title to property, nor a defaulted obligation of a foreign sovereign, nor was a foreign sovereign a party in either case.

ted, based upon repudiations by the foreign sovereign of its obligations on unrelated debts.

Counsel for respondent have gone to great length in the court below to make the point that the words "act of state" do not appear in any of the briefs or opinions in *Republic of China*. This is quite understandable, since the act of state doctrine was not involved in that case. Nor is it in this one.

The undisputed facts upon which petitioner's counterclaim is based are that the Cuban government took petitioner's property, the value of which is stipulated for purposes of this action, and failed to pay that value, or any compensation, to petitioner. That value is, and for more than eleven years, has been due and owing to petitioner. Petitioner does not attempt to recover that amount in this action, but it does seek, consistently with the judgment in *Republic of China*, to curtail respondent's recovery in this action. The essence of petitioner's position is that it is entitled, in fairness, to reduce the amount respondent would take from it in this action by the amount respondent has already taken.

Adjudication of petitioner's right to set-off the conceded monetary value of its property against the monetary claim made against it in this action, does not call in question the validity of any Cuban law or conduct.[4] Rather, it gives effect to specific Cuban decrees that explicitly recognize the obligation to pay. (Fundamental Law of Cuba, Art. 24, *infra*, p. 6a; Cuban Law No. 851, *infra*, p. 3a.) Adjudication of the right to setoff raises none of the political questions discussed in *Sabbatino*. *Cf. infra*, pp. 13-15. It

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[4] Admittedly, it denies effect to Cuba's failure and presumed refusal to pay for what it took, but that was the consequence in *Republic of China*, and respondent itself has said "There may be some question as to whether a simple failure to meet a debt, unaccompanied by any specific act or repudiation, constitutes an Act of State. . . ." Brief in Opposition to Second Petition for Certiorari, p. 11, n. 9.

clouds no title to property now or hereafter moving in the channels of international trade, nor does it call in question respondent's title and right to possession of the Cuban properties that formerly belonged to petitioner and are now held and enjoyed by respondent.

The court below erred in holding that the act of state doctrine barred consideration of petitioner's claim that its right to compensation diminished respondent's claim to recovery in this case. For the reasons set forth in Point II of this brief, the district court correctly determined the validity of petitioner's right to set-off its claim against respondent's claim.

2. *Congress has Declared that the Courts of this Country shall Not, on the Ground of the Act of State Doctrine, Refrain from Adjudicating the Merits of a Claim Arising out of a Violation of International Law.* Following the decision of this Court in *Sabbatino,* Congress addressed itself to the act of state doctrine by amending the Foreign Assistance Act of 1961. "Congress there declared that the courts of this country should not refrain, on the ground of the act of state doctrine, from determining the merits in cases involving a confiscation after January 1, 1959, by act of a foreign state 'in violation of the principles of international law, including the principles of compensation'" (Bryan, J.) (A. p. 39). The application and the constitutionality of that declaration was promptly tested in the *Sabbatino* litigation itself. The district court held that the amendment was constitutional, notwithstanding the prior application of the act of state doctrine. It examined the validity of Cuban Law No. 851 and held that it was in violation of international law. The Second Circuit affirmed, and this Court denied certiorari. *Banco Nacional de Cuba* v. *Farr,* 383 F.2d 166 (2d Cir. 1967), *cert. den.* 390 U.S. 956.

Accordingly, Judge Bryan, who had theretofore held this case in abeyance for nearly six years, properly regarded

himself as under a Congressional directive to adjudicate petitioner's counterclaim on the merits; he held, on the merits, that petitioner was lawfully entitled to offset against respondent's claim in this case the amount due and owing to it from the Cuban government as compensation for its seized Cuban properties. The court below found no error in the district court's analysis of the legal consequences of respondent's confiscations. It confined itself to a holding that the Congressional declaration as to the act of state doctrine was not available to this petitioner in this case, accepting the fact that the taking of petitioner's property was in violation of international law, a condition specified by Congress and found by the district court. The court below construed the words "claim of title or other right to property" as if they referred only to *tangible personal* property that had found its way into the United States. This strained interpretation, which has been severely criticized,[5] will produce an anomaly in the law and an inconsistency of decision within the same circuit, if it is left uncorrected. So read, the statute would require adjudication on the merits only on claims asserted by the owners of particular commodities such as sugar, tobacco or oil, or the proceeds of any of them, and would deny justice to the owners of other classes of property, such as real estate, negotiable instruments or intangibles, or the proceeds of any of them. Any such discriminatory enactment would be constitutionally unsound as irrational, a denial of equal treatment to former owners of property in Cuba and a denial of due process of law to petitioner. The court of appeals erred in interpolating by implication a condition which, to say the least,

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[5] *See* Lillich, *International Law, 1970 Survey of New York Law,* 22 Syracuse L. Rev. 269-80 (1971); Note, 11 Va. J. Int'l L. 406 (1971); Malawer, *The Act of State Doctrine and the City Bank Case: A Proper Role for the Judiciary in the World Public Order,* 1 Balt. L. Rev. 70 (1971).

would raise a grave question as to the constitutional validity of the statute. *Russian Volunteer Fleet* v. *United States,* 282 U.S. 481 (1931), at 492.

The court below's reading of the Hickenlooper Amendment should be corrected by this Court. The court below's decision in *Banco Nacional de Cuba* v. *Farr,* 383 F.2d 166 (2nd Cir. 1967), *cert. den.* 390 U.S. 956, is a holding that Cuban Law No. 851 violated international law and warranted judicial relief to a United States national aggrieved by Cuban action under it.[6] The decision of the same court in this case now denies judicial relief to a United States national aggrieved by action under that same Cuban law, on the ground that the act of state doctrine precludes judicial examination. This pushes the act of state doctrine beyond the bounds of rationality, and is such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Rule 19(1)(b), Rules of the Supreme Court of the United States.

3. *The Act of State Doctrine should not be Applied Where to do so Usurps the Executive Prerogative in the Conduct of Foreign Affairs.* The issue of whether a court of the United States should or should not determine the validity of a foreign act of state bears "importantly on the conduct of the country's foreign relations and more particularly on the proper role of the Judicial Branch in this sensitive area." *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398 (1964), at 407.

While the act of state doctrine is a judicial rule of self-restraint, it was developed and is applied for political considerations. Justice Harlan carefully noted that the doctrine is not prescribed by international law nor by the

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[6] *Accord, Anglo-Iranian Oil Co.* v. *Jaffrate,* [1953] 1 W.L.R. 246 (*The Rose Mary*).

Constitution, and its "constitutional underpinnings" rest upon "the basic relationship between branches of government in a system of separation of powers", 376 U.S., at 423. The doctrine "concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations", 376 U.S., at 423. The Constitution "does not irrevocably remove from the judiciary the capacity to review the validity of foreign acts of state", 376 U.S., at 423. Deference due the political branches of government compels abstention where such review might encroach upon the prerogatives of those to whom the Constitution entrusts the conduct of foreign affairs. But when the political arm of government has made a formal declaration in the area of its competence, abstention is neither required nor justifiable. *Ex parte Peru,* 318 U.S. 578 (1943); *Republic of Mexico* v. *Hoffman,* 324 U.S. 495 (1940).

Judge Hays was, therefore, quite correct in his statement that the majority below, "by applying the act of state doctrine after an independent evaluation of the merits of the State Department's decision, is usurping the same executive prerogative which it is the function of that doctrine to preserve." (A. p. 87)

That the act of state doctrine is an incident of Executive power is beyond doubt. Even though self-imposed, it is a restraint on Judicial power, and the fundamental purpose of this restraint is to preserve the Executive prerogative in the field of foreign policy. (A. p. 87; cf. *Ex parte Peru, supra; Republic of Mexico, supra; Rich* v. *Naviera Vacuba, S.A.,* 295 F.2d 24 (4th Cir. 1961); *Oetjen* v. *Central Leather Co.* 246 U.S. 297, at 302). It is true that judicial abstention in aid of this Executive prerogative may result in indirect benefits to a foreign government, but that is a casual consequence and not a primary purpose of the act of state doctrine. The Government of the United States

is the beneficiary of the doctrine; it is a perversion of constitutional principles for a court in the United States, as did the majority of the panel below, to apply that doctrine for the benefit of a foreign government in derogation of our Government's explicit findings and declaration as to the foreign policy of the United States.

In the circumstances of this case, the application of the act of state doctrine would create an unacceptable conflict between the Judicial and Executive branches of government. As was said by Mr. Chief Justice Stone in *Republic of Mexico* v. *Hoffman, supra:*

> It is not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize. (324 U.S., at 35.)

And, as observed by Mr. Justice Frankfurter, concurring, in the same case:

> It is my view, in short, that courts should not disclaim jurisdiction which otherwise belongs to them . . . except when "the department of the government charged with the conduct of our foreign relations," or of course Congress, explicitly asserts that the proper conduct of these relations calls for judicial abstention. Thereby responsibility for the conduct of our foreign relations will be placed where power lies. And unless constrained by the established policy of our State Department, courts will best discharge their responsibility by enforcement of the regular judicial processes.

In summary, the court below erroneously applied the act of state doctrine because, to the extent that petitioner's counterclaim is based upon a debt of Cuba to it, the doctrine has no application, and to the extent that the doctrine might be applicable, its effect has been nullified by the explicit

pronouncements of the Legislative and Executive branches of our government.[7]

II

The District Court Correctly Held that Petitioner is Entitled to its Offset.

This case was submitted to the district court in 1961 on cross motions for summary judgment. While the evidentiary material submitted by both sides, consisting of affidavits and exhibits, was voluminous, there is no dispute as to the facts. (Respondent's Brief in Opposition to Second Petition for Certiorari, p. 2.) Throughout the long history of this litigation, the parties have confined their differences to the inferences and legal consequences to be drawn from facts that are not in dispute.

The findings and determination of the district court were, in consequence, essentially simple. That court found and held that the Cuban government seized and retained petitioner's property in Cuba and that petitioner was lawfully entitled to offset the value of the property so taken against the claim of the respondent asserted in this case. (A. p. 47) The parties have stipulated that if the defendant [petitioner] is lawfully entitled to the offset claimed by it

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[7] In *Isbrandtsen Tankers, Inc.* v. *President of India,* 446 F.2d 1198 (2d Cir. 1971) the Second Circuit affirmed the role of the State Department in determining whether or not a given sovereign could be held responsible for its obligations. In *President of India,* it was held that the suggestion of immunity by the Department of State overrode the sovereign's otherwise applicable waiver of immunity, citing *Victory Transport, Inc.* v. *Comisaria General,* 336 F.2d 354 (2d Cir. 1964), *cert. den,* 381 U.S. 934 (1965), and *National City Bank of New York* v. *Republic of China,* 348 U.S. 356 (1955). Also see *Heaney* v. *Government of Spain,* 445 F.2d 501 (2d Cir. 1971). In neither *President of India* nor *Heaney* did the court below cite this case.

the amount thereof is such that plaintiff [respondent] will take nothing in this action. (A. p. 4.).

Throughout this litigation respondent has sought by two devices to evade the conclusion reached by the district court. The first is that the Cuban government's confiscation of the property of United States nationals is an exercise of sovereignty and therefore gives rise to no legitimate claim by deprived United States nationals either for return of their property or for compensation. The second is that respondent is so far divorced from the Cuban government as to insulate its claim, for the proceeds of collateral pledged to secure a loan to the Cuban government, from a counterclaim or offset against that government.

1. *The District Court Correctly Determined that Petitioner has a Valid Counterclaim against Cuba.* The essence of the district court's opinion was that Cuba's confiscation of American property, including that of this petitioner, violated international law and that petitioner was entitled to indemnity for its loss. This conclusion by the district court was consistent with the formal protests of our Government, 43 Dept. of State Bull. 603, 604; 43 Dept. of State Bull. 171; 43 Dept. of State Bull. 316, and was dictated by the judgments of the Court of Appeals for the Second Circuit in the *Sabbatino* litigation. *Banco Nacional de Cuba* v. *Sabbatino,* 307 F.2d 845 (2d Cir. 1962) *rev'd, o.g.* 376 U.S. 398 (1964); *Banco Nacional de Cuba* v. *Farr,* 383 F.2d 166 (2d Cir. 1967), *cert. den.* 390 U.S. 956. The Cuban confiscation involved in this case, as in the *Sabbatino* litigation, in other cases in the Second Circuit[8], and in the claims filed with the Foreign Claims Settlement Commission, were implementations of Cuban Law 851. Every court in the United States that has had occasion to examine Cuban Law 851 has found that the seizures of the property of United States nationals pursuant to that law were in violation of international law. No court in the United States

[8] E.g. *Banco Nacional de Cuba* v. *The Chase Manhattan Bank,* S.D.N.Y., 60 Civ. 4663; *see* A. p. 34.

has held or suggested that such Cuban confiscations were a lawful exercise of sovereign prerogative.[9]

In the *Sabbatino* litigation, the District Court for the Southern District of New York held the Cuban action to be in violation of international law, 193 F. Supp. 375; the Second Circuit, in an illuminating and exhaustive opinion, affirmed this conclusion, 307 F.2d 845. This Court did not disturb those determinations; it held only that in the circumstances of the *Sabbatino* litigation and in the absence of any contrary indication by the Executive or Legislative branches, the act of state doctrine made adjudication inappropriate. Following enactment of the amendments to the Foreign Assistance Act of 1964, 22 U.S.C. § 2370(e), as amended, 79 Stat. 658-59 (Sept. 6, 1965), these same Cuban confiscations, in the same context, were reexamined by the Southern District and the Second Circuit. Upon such reexamination the original determination of invalidity under international law was reaffirmed, and was left undisturbed by this Court. *Banco Nacional de Cuba* v. *Farr*, 383 F.2d 166 (2d. Cir. 1967), *cert. den.* 390 U.S. 956.

Moreover, this case presents circumstances that were not present in *Sabbatino*. Petitioner's right to compensation for its property is supported by the determination that the Cuban taking was in violation of international law, but its right to compensation is not dependent solely upon the invalidity of Cuban Law 851. The right to compensation for property taken by a sovereign is a universal proposi-

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[9] In *Pons* v. *Republic of Cuba*, 294 F.2d 925 (D.C. Cir. 1961), *cert. den.* 368 U.S. 960 (1962), the court did not reach the merits because the counterclaim was asserted by a Cuban national, who was not entitled, as against his own government, to raise any claim based on violation of international law or of Cuban law. (*See* A. p 38, n. 4) Nonetheless, then Circuit Justice Burger was moved to say, in dissent, that

> I do not think we should carry the act of state doctrine to the point where we permit a foreign state to come into our courts as a suitor and secure equitable relief on better or different terms than those available to an American litigant in the same courts.

tion. United States Constitution, Amendments V, XIV; Fundamental Law of Cuba, Article 24; Cuban Law No. 851; Hackworth, *Digest of International Law* Vol. III, 656, 662; Restatement (Second), *Foreign Relations Law of the United States,* §§ 185-192; Hyde, *International Law Chiefly as Interpreted and Applied by the United States,* 710-25 (2d rev. ed. 1947); *see,* generally, Wortley, *Expropriation in Public International Law,* 33-36 (1959).[10]

Cuban law follows and expresses this proposition. Article 24 of the Fundamental Law of Cuba requires that compensation be paid for property taken by the government. Cuban Law 851 itself gives explicit recognition to this principle although the specific compensation there promised is illusory and, in fact, was never paid.

The proposition is a fundamental policy of the United States. (Constitution, Amendments V, XIV.) In the view of the United States, the right to prompt, adequate and effective compensation is an essential and fundamental principle of international law, observed and recorded in specific terms by the Legislative and Executive branches. Congress has defined the obligations of an expropriating sovereign to include "speedy compensation for such property in convertible foreign exchange, equivalent to the full

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[10] Although respondent, in its briefs below, has denied the universality of this proposition, the great weight of authority holds that governmental seizure of property requires the payment of fair compensation. Some commentators maintain that the sovereign obligation does not extend beyond payment of some compensation or even beyond provision for deferred payment; Friedman, *Expropriation in International Law,* 206 (1953); Dawson & Weston, *"Prompt, Adequate and Effective": A Universal Standard of Compensation?,* 30 Ford. L. Rev. 727 (1962); *compare* Fachiri, *Expropriations & International Law,* [1925] Brit. Y. B. Int'l L. 15, *with* Williams, *International Law and the Property of Aliens* [1928] Brit. Y. B. Int'l L. 1; *cf. Sabbatino,* 376 U. S., at 428, n. 26, 429 n. 31, 430 n. 32, *but see* 430 n. 34. The United States has never regarded as persuasive those isolated instances in which confiscators or their apologists have declined to be bound by any requirement of compensation, or have urged, in furtherance of their immediate political purposes, that the established rule be abrogated. Hackworth, etc., *supra.*

value thereof, as required by international law". 22 U.S.C. § 2370(e)(1). The Executive has stated that

> The Government of the United States merely adverts to a self-evident fact when it notes that the applicable precedents and recognized authorities on international law support its declaration that, under every rule of law and equity, no government is entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate, and effective payment therefor. In addition, clauses appearing in the constitutions of almost all nations today, and in particular in the constitutions of the American republics, embody the principle of just compensation. These, in themselves, are declaratory of the like principle in the law of nations.

Note of Secretary of State Cordell Hull, August 22, 1938, to the Mexican Government, Hackworth, *supra,* Vol. III, 658-9. In an earlier letter, Secretary Hull said that

> The taking of property without compensation is not expropriation. It is confiscation. It is no less confiscation because there may be an expressed intent to pay at some time in the future. (*id.*, 656)

It is this proposition, therefore, that our courts are bound to declare and support whenever it is challenged. In *The Paquete Habana,* 175 U.S. 677 (1900), this Court said:

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.

In this case, the question of whether the right to compensation is a principle of international law is duly pre-

sented to the Court for determination. This Court's disposition of this case, no matter whether by adjudication on the merits or by refusal to adjudicate, will resolve that question. This is true for the following reasons:

Cuba's seizure of petitioner's property is a notorious fact, conceded in the record. (A. p. 30) The institution by respondent of this action puts the legal consequences of that fact in issue; because, if petitioner has a claim for compensation, respondent by stipulation can recover nothing in this action.[11] If the Cuban seizure of petitioner's property gave rise to no claim or right to compensation, petitioner's counterclaim fails. Affirmance of the district court's judgment will affirm the proposition, so often enunciated by our Government, that a sovereign's right to take property of United States nationals is coupled with an obligation to make prompt, adequate and effective compensation. But reversal of the district court's judgment will legitimize Cuba's proposition: that a foreign sovereign may, for whatever reason, seize and retain the property of American nationals, free from any obligation to pay for what it has taken and from any obligation to account for its conduct, even when it voluntarily enters American courts seeking the help of American law.

The courts found in the *Sabbatino* litigation that the Cuban confiscations upon which petitioner's counterclaim is based were intended to and did discriminate against United States nationals in retaliation for United States government action displeasing to the Cuban government, and deprived those American nationals of property without compensation or indemnity whatsoever. *Banco Nacional de Cuba* v. *Farr,* 383 F.2d 166 (2d Cir. 1967), *cert. den.,* 390 U.S. 956 (1968). The essence of respondent's position is that Cuba's sovereignty bars any remedy for this confiscation in the courts of the United States, even in

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[11] Under Rule 13 of the Federal Rules of Civil Procedure it was proper (indeed, may have been compulsory) for petitioner to plead that offsetting claim as a counterclaim.

an action instituted in those courts by Cuba itself. To hold for the respondent, therefore, means acquiescence in its declaration of sovereign irresponsibility. It means that the international law which is a part of our law, and which our courts must therefore administer, is the version of international law that Cuba finds most advantageous to it in the context of this lawsuit. It means the repudiation of the United States' view of international law as expressed by the Executive and Legislative branches; it constitutes a judicial reversal of the foreign policy of the United States as formally declared since the earliest days of the Republic.

2. *The District Court Correctly Found that the Counterclaim was Properly Pleaded.* As often as the respondent has argued that Cuba's confiscation of petitioner's properties was *damnum absque injuria,* it has argued that, in any event, Banco Nacional de Cuba is not answerable for the debts or defaults of the Cuban government. This fabrication was demolished by the district court and was not examined by the court of appeals. It deserves no consideration; but, as it has so repeatedly been urged by the respondent, we are constrained to anticipate that this argument will be made once more.

The district court found, upon the full record before it, that Banco Nacional is for purposes of this litigation indistinguishable from the government of Cuba. Banco Nacional has always been the central bank of Cuba, acting for the government, and as its fiscal agent. Whatever corporate or functional autonomy it enjoyed prior to 1959 completely disappeared since the accession of the Castro government. The facts are carefully assembled and conscientiously analyzed in Judge Bryan's opinion and amply support his conclusion. (A. p. 37, n. 3) Indeed, the respondent itself has not sought to conceal its identification with the Cuban state and has actually emphasized that fact when it deemed it advantageous to do so. *French* v. *Banco Nacional de Cuba,* 23 N.Y.2d 46 (1968); *see Rabinowitz* v.

Kennedy, 376 U.S. 605 (1964). In this very case, respondent pleaded sovereign immunity, over the signature of its present attorney, in its reply to the counterclaims (Def. Mot., Exhibit 5 (Reply), p. 5. (The form of the Reply was later amended to substitute hypothetical allegations) (A. p. 32).

The short answer to respondent's contention, however, is that, regardless of its independence of or subservience to the Cuban government and even if it were, as pretended, an autonomous corporate body, in the transaction with the bank leading to this litigation—that is, the making of the loan and the pledging of the collateral—the role of respondent has been that of agent for the Cuban government. Cuba is the real party in interest in this litigation. The loan was made to the Cuban government, and the collateral has always been Cuban government property. Common sense and simple justice make it entirely appropriate to offset the Cuban claim for proceeds of that collateral against the obligation that the Cuban government incurred when it took petitioner's property.

Conclusion

The judgment below should be reversed and the judgments of the district court reinstated.

Respectfully submitted,

HENRY HARFIELD
Attorney for Petitioner
53 Wall Street
New York, N. Y. 10005

SHEARMAN & STERLING
HERMAN E. COMPTER
JAMES B. KEENAN
Of Counsel

November 24, 1971

Statutes

Foreign Assistance Act of 1964, 22 U.S.C. § 2370(e), as amended, 79 Stat. 659 (1965):

(1) The President shall suspend assistance to the government of any country to which assistance is provided under this chapter or any other Act when the government of such country or any government agency or subdivision within such country on or after January 1, 1962—

(A) has nationalized or expropriated or seized ownership or control of property owned by any United States citizen or by any corporation, partnership, or association not less than 50 per centum beneficially owned by United States citizens, or

(B) * * *

(C) * * *

and such country, government agency, or government subdivision fails within a reasonable time (not more than six months after such action, or, in the event of a referral to the Foreign Claims Settlement Commission of the United States within such period as provided herein, not more than twenty days after the report of the Commission is received) to take appropriate steps, which may include arbitration, to discharge its obligations under international law toward such citizen or entity, including speedy compensation for such property in convertible foreign exchange, equivalent to the full value thereof, as required by international law, or fails to take steps designed to provide relief from such taxes, exactions, or conditions, as the case may be; and such suspension shall continue until the President is satisfied that appropriate steps are being taken, and no other provision of this chapter shall be construed to authorize the President to waive the provisions of this subsection.

* * * * *

(2) Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right to property is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law, including the principles of compensation and other standards set out in this subsection: *provided*, That this subparagraph shall not be applicable (1) in any case in which an act of a foreign state is not contrary to international law or with respect to a claim of title or other right to property acquired pursuant to an irrevocable letter of credit of not more than 180 days duration issued in good faith prior to the time of the confiscation or other taking, or (2) in any case with respect to which the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court.

Cuban Law of Nationalization No. 851

I, DR. OSVALDO DORTICOS TORRADO, President of the Republic of Cuba, do hereby make known that the Council of Ministers has enacted and I have approved the following legislation:

WHEREAS, the attitude assumed by the government and the Legislative Power of the United States of North America, which constitutes an aggression, for political purposes, against the basic interests of the Cuban economy, as recently evidenced by the Amendment to the Sugar Act just enacted by the United States Congress at the request of the Chief Executive of that country, whereby exceptional powers are conferred upon the President of the United

States to reduce the participation of Cuban sugars in the American sugar market as a threat of political action against Cuba, forces the Revolutionary Government to adopt, without hesitation, all and whatever measures it may deem appropriate or desirable for the due defense of the national sovereignty and protection of our economic development process.

WHEREAS, Article 24 of the Fundamental Law of the Republic authorizes the forced expropriation of property, leaving it to the ordinary laws to confer authority and competent jurisdiction to decree the expropriations and to regulate the procedure for the accomplishment thereof and the means and terms for the payment of the expropriated property.

WHEREAS, it is advisable, with a view to the ends referred to in the first Whereas of this Law, to confer upon the President and the Prime Minister of the Republic full authority to carry out the nationalization of the enterprises and property owned by physical and corporate persons who are nationals of the United States of North America, or of enterprises which have majority interests or participations in such enterprises, even though they be organized under the Cuban laws, so that the required measures may be adopted in future cases with a view to the ends pursued.

NOW, THEREFORE: In pursuance of the powers vested in it, the Council of Ministers has resolved to enact and promulgate the following

LAW No. 851

ARTICLE 1. Full authority is hereby conferred upon the President and the Prime Minister of the Republic in order that, acting jointly through appropriate resolutions whenever they shall deem it advisable or desirable for the protection of the national interests, they may proceed to nationalize, through forced expropriation, the properties or

enterprises owned by physical and corporate persons who are nationals of the United States of North America, or of the enterprises in which such physical and corporate persons have an interest, even though they be organized under the Cuban laws.

ARTICLE 2. In the resolutions providing for the expropriations the President and the Prime Minister of the Republic shall declare the necessity, public utility and national interest justifying such action.

ARTICLE 3. The President and the Prime Minister of the Republic shall also designate in the resolutions above referred to in Article 1 of this Law, the persons or agencies that shall have charge of the administration of the properties or enterprises expropriated hereunder.

ARTICLE 4. Once the expropriation of a property has been consummated and the administration thereof taken over by the person or agency designated therefor, the President and the Prime Minister of the Republic shall appoint appraisers of their election to determine the value of the expropriated property for the purposes of the payment thereof, which shall be effected as provided in the following article.

ARTICLE 5. The payment for the expropriated property shall be made, after the due appraisal thereof, in accordance with the following rules, to wit:

(a) The payment shall be made in Bonds of the Republic, which will be issued for that purpose by the Cuban State and shall be subject to the terms and conditions set forth in this Law.

(b) For the amortization of said Bonds, and by way of security therefor the Cuban State shall set up a sinking fund which shall be fed annually with twenty-five per cent (25%) of the foreign exchange corresponding to the excess

of the purchases of sugar made in each calendar year by the United States of North America over and above Three Million (3,000,000) Spanish Long Tons, for their domestic consumption, at a price of not less than 5.75 cents of a dollar per English pound (F.A.S.). To this end the National Bank of Cuba shall open a special dollar account which shall be captioned "Fund for the Payment of Expropriations of Properties and Enterprises of Nationals of the United States of North America".

(c) The Bonds shall draw at least two per cent (2%) annual interest, which shall be paid only and exclusively out of the fund to be set up and fed pursuant to Rule (b).

(d) Such annual interest as cannot be paid out of said Fund referred to above in Rule (b) shall not be cumulative, but the obligation to pay it shall be deemed extinguished.

(e) The Bonds shall be amortized in a period of not less than thirty (30) years counted from the date on which the expropriation of the property or enterprise involved is actually consummated, and the President of the National Bank of Cuba is hereby authorized to determine how and to what extent they will be amortized.

ARTICLE 6. The resolutions jointly issued by the President and the Prime Minister of the Republic in the forced expropriation proceedings instituted hereunder may not be appealed, as no remedial action shall be available there against.

ARTICLE 7. The Minister of the Treasury is hereby directed to issue, in the name and behalf of the Cuban State, the Bonds with which the property expropriated hereunder will be paid for.

ARTICLE 8. This law supersedes all and whatever legal and statutory provisions may be repugnant hereto, or may conflict with the enforcement hereof, and shall become operative from the date of its publication in the Official Gazette of the Republic.

NOW THEREFORE: I hereby order that this law to be fully and strictly observed and enforced.

Done at the Presidential Palace, in Havana, this 6th day of July, 1960.

OSVALDO DORTICOS TORRADO
President

Fidel Castro Ruz, Prime Minister.
Rolando Díaz Aztaraín, Minister of the Treasury.

(Official Gazette No. 130, of July 7, 1960).

Fundamental Law of Cuba

ARTICLE 24. Confiscation of property is prohibited, but it is authorized for the property of the Tyrant deposed on December 31, 1958 and of his collaborators, of natural or juridical persons responsible for crimes committed against the national economy or the public treasury, and those who are enriched or have been enriched unlawfully under the protection of the public power. No other natural or juridical person can be deprived of his property except by competent judicial authority and for a justifiable reason of public benefit or social interest and always after payments of appropriate compensation in cash, fixed by court action. Non-compliance with these requirements shall give the person whose property has been expropriated the right to protection by the courts and, if the case warrants, to restitution of his property.

The reality of the grounds for public benefit or social interest and the need for expropriation shall be decided by the courts in the event of challenge.

ARTICLE 87. The Cuban State recognizes the existence and legitimacy of private property in its broadest concept as a social function and without other limitations than those which, for reasons of public necessity or social interest, are imposed by law.